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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 338

CK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

ILLIAM PATRICK BRANDHOVE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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No. 338

Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities (a California Legislative Committee), Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson,

Petitioners,

vs.

William Patrick Brandhove,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, William Patrick Brandhove, herewith submits his brief in answer to Petitioners above named, as follows:

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-126) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121.

JURISDICTION.

The jurisdictional requisites are adequately set forth in Petitioners' Brief p. 2.

QUESTIONS PRESENTED.

The sole question presented is whether Respondent's complaint states a claim for relief against Petitioners under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

In the light of Petitioners' contentions, the following subordinate questions will be discussed:

1. Do Sections 43 and 47(3), 8 U.S.C. impose civil liability where under color of State law a reprisal or punishment has been inflicted on one

who has exercised a federal right secured by the Constitution and laws of the United States?

2. Are State legislators immune from civil liability under the Civil Rights Statutes?

3. Was Respondent in circulating a petition for redress of grievances among the members of the California Legislature, protected under the rights of petition and free speech guaranteed in the First Amendment as transmitted into the Fourteenth Amendment of the United States Constitution?

4. Was Respondent denied due process of law by Petitioners?

5. Was Respondent denied the equal protection of the laws by Petitioners acting in conspiracy?

6. Were privileges and immunities of Respondent abridged by Petitioners?

7. Can a State legislative committee and its members escape the scrutiny of the Federal Courts where facts are alleged to show a conspiracy under color of State law to violate fundamental Federal Rights?

8. Is the California Senate Resolution (R. 12) creating the Senate Fact-Finding Committee on Un-American Activities unconstitutional for lack of definiteness and certainty as applied to the facts pleaded in Respondent's complaint?

9. Is Respondent entitled to trial on his complaint?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra,* pp. i-iii.

STATEMENT.

Respondent filed a complaint in the District Court against Petitioners and one Elmer E. Robinson for general, special and punitive damages in the sum of $250,000.00 (R. 3). The complaint was under the Civil Rights Statutes (Rev. Stat. Sections 979, 1980; 8 U.S.C. Sections 43, 47 (3); Appendix A *infra* pp. i-ii) and alleges acts done or participated in by Petitioners and Robinson:

> "with malice and intent to intimidate and silence plaintiff [Respondent] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the [California] legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff [Respondent]." (Complaint par. 13; R. 10).

The complaint further alleges that Petitioners acted in conspiracy and under color of State law (Complaint par. 14; R. 10) and that Robinson participated in the conspiracy (Complaint par. 14; R. 10).

As disclosed by the record, Respondent's complaint is predicated upon the following sequence of events therein pleaded:

On January 28, 1949, Respondent, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State Capitol in Sacramento (R. 4, 18-22). The subject matter of said petition was stated therein as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end" (R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (R. 19-20), and the stated purpose of said petition was to persuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (R. 5, 18-22).

While Respondent was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949 (R. 5, 22-23). No reference was made in said subpoena to the purpose or object of such hearing, or of the testimony required thereat (R. 5, 22-23). Before the service of

said subpoena on Respondent, but after the content of said circulated petition had become known to Petitioner Tenney, said Petitioner, the chairman of the criticized committee, discussed with Robinson the best ways and means of thwarting the charges contained in said petition and defeating the purpose thereof, and they then and there agreed that the aforementioned hearing should be held, and that Robinson should appear at said hearing as a voluntary witness to deny the truth of the contents of Respondent's petition (R. 5-6, 45-47).

On the same day, to wit, January 28, 1949, and in order to silence Respondent and defeat the effect of his said petition, Petitioners Tenney and Burns, chairman and vice-chairman respectively of The Tenney Committee, dispatched State telegrams to two District Attorneys of the State of California, referring to Brandhove's petition and demanding on behalf of said Committee that Respondent be prosecuted for perjury (R. 6, 23-25).

A hearing was held by The Tenney Committee on January 29, 1949, at which all Petitioners were sitting as members of said Committee, and at which Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness (R. 6, 27-28, 47). At said hearing Robinson was permitted to make a lengthy unsworn statement first (R. 7, 45-48) and after having been sworn, was given unbridled discretion by the Committee in conducting a self justification of the charges contained in respondent's petition (R. 7, 50-67). Pursuant to the subpoena served upon

him, Respondent appeared at said hearing and after answering questions as to his identity (R. 28) objected to the committee's further questions on the grounds, among others, that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in Respondent's petition to the California Legislature and was therefore then acting as judge and accused in the same case, thereby exceeding its power and jurisdiction (R. 8, 28-32, 35-38). All objections were overruled by The Tenney Committee (R. 32) and Respondent was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him (R. 7, 38-41, 42-43). At said hearing Petitioner Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of Respondent and a newspaper article wherein an affidavit of Respondent was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to Petitioner Tenney "that Mr. Brandhove (Respondent) was a liar" (R. 7, 43-45, 74). Furthermore, at said hearing Respondent's counsel, although he was not summoned, was called as a witness by said Committee and interrogated at length about his schooling and private affairs, and when he referred to decisions of the United States Supreme Court supporting the objections raised by Respondent against said hearing and supporting Respondent's refusal to answer questions thereat, said counsel was threatened

with expulsion from the hearing room (R. 7-8, 48-50, 34-35). At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of Respondent's refusal to answer questions thereat (R. 8, 42). Such complaint charging Respondent with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by Petitioner Tenney was filed on January 31, 1949, in the Municipal Court of the City of Sacramento (R. 8, 74). Upon said complaint, Respondent was arrested and imprisoned from February 1st to February 15th, 1949 (R. 8). Respondent was tried with jury on said complaint from February 28, 1949, to March 5, 1949, with the result that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction (R. 9). On March 9, 1949, by motion of the prosecuting attorney the charge was dismissed and the Respondent discharged. Respondent committed no public offense by refusing to answer questions at said hearing since the questions were not material or proper as required by section 9412 of the California Government Code (R. 8-9) and the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution, the California law and the resolution creating The Tenney Committee (R. 12).

After his discharge Respondent brought this suit for damages under the Civil Rights Statutes, basing his

claim for relief upon his having been deprived by Petitioners and Robinson of fundamental federal rights.

Upon Petitioners' and Robinson's motions to dismiss the complaint (R. 76-85, 89-97) the District Court made its order granting said motions (R. 124-125) and entered judgment dismissing Respondent's action on the merits (R. 125-126).

On appeal from the judgment of the District Court (R. 126) the Court of Appeals for the Ninth Circuit reversed the judgment with remand as to Petitioners and affirmed the judgment with regard to Robinson (R. 137, 183 F. (2d) 121).

SUMMARY OF THE ARGUMENT.

The present action is based upon intentional abuse by State authority to deny a political opponent: (1) The right to petition his legislature for redress of grievances; (2) the right of free speech; (3) the right to a fair and impartial hearing in matters concerning his person, privacy, opportunity to earn a living, and his honor; and (4) the equal protection of the laws. For these infringements of secured federal rights, Respondent is entitled to damages both under Section 43 and Section 47 (3), Title 8, U.S.C.

Under Section 43, Respondent relies upon the fact that Petitioners acted under color of State law. They acted as members of the California Senate Committee on Un-American Activities, which committee was

created by a resolution of the California State Senate and under which the Committee is given blanket authority to investigate into subversive activities. The fact that the members of that Committee are acting in their capacity as members of the California legislature does not confer immunity upon them to violate the federal rights of another. The legislature is an organ of the State no less than the judicial or executive branch of the State government; and the State cannot vest immunity from liability under the Civil Rights Statutes in any of its agencies of State power.

In exercising his right to petition for discontinuance of said Committee, Respondent addressed himself to the proper authority—the California legislature. Petitioners acted in conspiracy to intercept Respondent's exchange of ideas with his legislature, thus preventing and hindering the legislature from considering and taking action on Respondent's petition. The right to petition the government for redress of grievances, historically and on principle, includes the right to be free from molestation, suppression, chicanery, and subsequent punishment for the exercise of the right.

Under the Fourteenth Amendment, the right to petition as transmitted from the First Amendment, involves the right of a citizen of a State to submit petitions to his own legislature without embarrassment or fear of subsequent reprisal.

Infringement of the right to petition for redress of grievances necessarily involves infringement of the exercise of the right of free speech. The right of peti-

tion is merely a specially emphasized and precious part of the right to speak freely. The right of free speech protects the speaker against prior restraint, suppression, and subsequent punishment, all of which were present here.

Respondent's right to due process of law secured by the Fourteenth Amendment was violated by Petitioners. Such violation must be considered in conjunction with the abridgement of Respondent's First Amendment rights, as well as apart therefrom. The concept of due process requires the maintenance of minimal standards of fundamental justice and fair play. These standards were here grossly disregarded. The Committee acted as judge and accused in the same cause. Its partiality found expression prior to the hearing in question by dispatch of State telegrams to State prosecutors, demanding indictment of Respondent for perjury, and by conspiracy with the star witness antecedent to the hearing. During the hearing, the Committee asked questions which were obviously improper since it had the answers thereto previously obtained from Respondent. The Committee disregarded the right of advocacy in its treatment of Respondent's counsel—this, with a view to intimidation of Respondent as well as counsel. By reading into the record of the hearing a false alleged criminal record attributed to Respondent and other deprecatory matters, the Committee traversed all appropriate standards of fairness and impartiality. A citation of Respondent for contempt based upon this hearing was entirely unlawful and resulted first in Respond-

ent's arrest and imprisonment thereon, and finally his discharge after jury disagreement (eleven for acquittal, one for conviction).

The denial of equal protection of the laws to Respondent by purposeful, arbitrary and discriminatory treatment here pleaded is closely analogous to *Niemotko v. Maryland,* 95 L. Ed. Adv. Op. 237, 239, with the difference that the elements of acting as judge and accused in the same cause, of vilification of the proponent, and of intimidation of proponent by the base treatment of his counsel—violations of due process—are present here while absent in the *Niemotko* case.

For the aforesaid reasons relating to the denial of equal protection of the laws, Petitioners are also liable in damages under Section 47 (3), Title 8, U.S.C.

In giving a claim for relief in damages to persons whose privileges or immunities have been abridged or infringed, Congress in Section 43 and Section 47 (3) made certain that any favorable position secured to a citizen under federal law, is within the protection of these sections, whatever the import of the same words used in the Fourteenth Amendment to the United States Constitution.

The California Senate resolution creating The Tenney Committee violates the due process clause of the Federal Constitution, Amendment Fourteen, in that it lacks the degree of certainty which is required in a statute or other rule of State law, as applied to Respondent's complaint of violation of fundamental federal rights.

In any event, Respondent's complaint which properly pleaded purpose, object and malice, as to Petitioners' conduct, could not be summarily dismissed on motion; Respondent is entitled to go to trial on his complaint.*

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*While this brief was in the process of printing, a brief by twenty-two States Attorneys General as amici curiae in support of Petitioners was served upon Respondent's counsel. This amici curiae brief seeks to raise issues other than those raised by Petitioners in their application for a writ of certiorari. We think that if such issues were properly raised, the Court would not reach them in this case. We rely, however, on the firmly established rule that what has not been raised on the certiorari petition cannot be later raised before this Court. The fact that Respondent cannot at this hour redraft his brief, illustrates in the particular case the wisdom of the rule.

There is, furthermore, no reason for Respondent to argue with amici curiae about the vagueness of the conduct upon which civil liability is predicated under the Civil Rights Statutes.

As to the Equal Protection Clause, Mr. Justice Rutledge, in *Screws v. United States*, 325 U.S. 91, 113, 123, observes as follows:

> "Certainly 'the equal protection of the laws', guaranteed by the Amendment, is not more vague and indifferent than many rights protected by other commands."

As to the Due Process Clause of the Fourteenth Amendment, Respondent does not rely, insofar as free speech and freedom of petitioning are concerned, on the general scope of that clause, but upon the First Amendment as read into the Fourteenth Amendment.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First becomes its standard." (*West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 639.)

Insofar as Respondent relies upon the Fourteenth Amendment as independent from the First Amendment, Petitioners' actions as pleaded, shockingly deviated from elementary rules of American fair play known to any reasonable person, to say nothing of State legislators entrusted with investigating what is un-American in the activities of others.

I.

RESPONDENT'S COMPLAINT IS WITHIN THE PURVIEW OF SECTIONS 43 AND 47 (3) OF TITLE 8 U.S.C. (CIVIL RIGHTS STATUTES).

By enacting Section 43 of U.S.C. Title 8, Congress gave a claim for relief sounding in tort to every individual within the jurisdiction of the United States whose federal rights are infringed by any person acting under color of state law.

Hague v. C.I.O., 307 U.S. 496;
United States v. Classic, 313 U.S. 299;
Screws v. United States, 325 U.S. 91;
Picking v. Penn. Ry. Co., 151 Fed. (2d) 240;
Gordon v. Garrson, D.C. Ill. (1948) 77 F. Supp. 477.

Petitioners contend that persons clothed with state authority are not liable in damages under Section 43 if they have used the state authority vested in them for a *reprisal or punishment* of one who has exercised a federal right secured by the Constitution and laws of the United States (Brief for Petitioners, page 56).

Such construction of Section 43 emasculates the protection of federal rights which Congress intended by the enactment. Under Petitioners' suggested construction, a state official could evade the sanctions of the section by punishing a citizen for having exercised a secured federal right and thereby effectively intimidate the person punished, as well as others, by creating an atmosphere in which fear of subsequent reprisal prevents the free exercise of the right. In the light of the evils aimed at by the enactment, the sug-

gested construction is erroneous; it would open the door wide for the exercise of state power in derogation of federal rights and subject guaranteed federal rights to abuse of state power which abuse Congress expressly intended to check.

Bomar v. Keyes (2 C.A.), 162 Fed. (2d) 136.

Moreover, in their suggested construction, Petitioners overlook the content of important federal rights, such as the right to speak freely and the right to petition the government for redress of grievances here involved. These rights include *freedom from prior censorship and subsequent punishment or reprisal,* as well as protection of the speaker while he is actually engaged in the physical process of disseminating his ideas.

See:

American Communications Association v. Douds, 339 U.S. 382, 396;

Terminiello v. City of Chicago, 337 U.S. 1, 4;

Cases collected, Annotation 93 L. Ed. 1151, 1153, 1154.

In relying on Section 47 (3), Respondent points out that the equal protection of the laws was denied him by Petitioners acting in conspiracy, and also, that such conspiracy was for the purpose of preventing and hindering the California Legislature from according him equal protection of the law with regard to his petition.—Violations of two express prohibitions of Section 47 (3).

Sections 43 and 47 (3) are *in pari materia* with the penal provisions of sections 241 and 242, Title 18

U.S.C. (formerly sections 51 and 52)[1] of which section 241 provides for criminal liability "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, *or because of his having so exercised the same*" (emphasis added).

Section 242 provides penal sanctions for one who "under color of any law * * * subjects any inhabitant of any state, territory or district to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States * * *"

Since Petitioners, under the allegations of Respondent's complaint, are within the scope of penal provisions designed to protect civil rights, their contention imputes to Congress an intent to punish such conduct but to deny indemnification to the injured party. This suggestion cannot be reconciled with the Congressional intent that the person injured be made whole for the unlawful conduct of his oppressors.

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[1] *Screws v. United States*, 325 U.S. 91, 99;
Picking v. Penn. Ry. Co., 151 F. (2d) 240;
Gordon v. Garrson (D.C.Ill., 1948), 77 F. Supp. 477.

II.

RESPONDENT'S COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE PROVISIONS OF SECTION 43 OF TITLE 8 U.S.C.

A. THE ACTION COMPLAINED OF WAS TAKEN UNDER COLOR OF STATE LAW.

Respondent's complaint clearly states that the acts of Petitioners were done under color of the authority conferred upon the California Senate Committee on Un-American Activities — The Tenney Committee. (R. 10). There can be no question that at all times material hereto Petitioners have acted under the color of the authority vested in The Tenney Committee by the resolution creating it under the California Constitution (R. 12-18).

Petitioners urge that they are immune from civil suit and that Section 43 must be read as if members of the state legislature were exempted from the prohibition and the sanctions of said section. This contention is clearly in opposition to the express language of the statute which imposes liability upon "Every person who under color of any statute, etc., of any state" engages in conduct prescribed by Congress. It is apparent that Congress did not intend any exception in favor of *any* person acting under color of state law whatever his position or eminence. Such all-embracing language clearly prevents any construction of the statute in disregard of its purpose.[18]

The purpose of Section 43 was to create an ironclad protection of federal rights against abuse of state

[18] In *Screws v. United States*, 325 U.S. 91, 97; legislators are expressly referred to along with other state officials as being sub- [illegible] provisions of the Civil Rights Statutes

power and this purpose could never be attained if Congress had allowed *anyone* clothed with state power to invade federal rights with immunity.

A state is free to vest whatever power it deems proper in the legislative branch of its government.[2] Hence, to say that the members of a state legislature can violate with immunity the federal rights protected by Section 43 means to deny the effective protection of those rights, for the states would be free to invade federal rights by effectively clothing its legislative agents with power to annul or evade the sanctions provided for in Section 43. As stated by the United States Supreme Court in *Ex parte Virginia*, 100 U.S. 339, 346, 347:

> "* * * A State acts by its Legislative, its Executive or its Judicial authority. It can act in no other way. * * * Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

See: *Screws v. United States*, 325 U.S. 91, 114 and 133.

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[2] See: *Hughes v. Superior Court of California*, 339 U.S. 460, 467: "For the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches (citing cases) 'rights under that amendment turn on the power of the state, no matter by what organ it acts', *Missouri v. Dockery*, 191 U.S. 165, 170, 171."

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes Constitutional rights. If that be a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, Sections 19 and 20 [241, 242, 18 U.S.C.] have done in a manner history has long since validated."

(Rutledge, J., concurring in result, *Screws v. United States*, page 133).

In *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240, it was held: Congress by enacting Section 43, Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (page 250); and further: Where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of plaintiffs to New York arose under Section 47, Title 8 U.S.C., Pennsylvania statutes Sections 192, 292 relieving the Governor of liability if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Statutes (page 251).

As recognized in the *Picking* case and in the concurring opinion of Justice Rutledge in the *Screws* case there can be no privilege created by state law to be immune from federal law for the violation of federal rights, and any such common law privilege has been abrogated by Congress to the extent indicated by the Civil Rights Statutes.

Whoever deems that such protection of federal rights by Congress is too harsh or burdensome upon state officials must necessarily address his argument to Congress. The imposition of civil liability under the Civil Rights Statutes for the deprivation of fundamental rights by abuse of state authority is not an innovation in the law but is a concept well known to the Common Law in its protection of ordered liberty.

As stated in *Wolf v. Colorado*, 338 U.S. 25, 30-31, footnote 1 thereof, in connection with the problem of the use of evidence secured through an illegal search and seizure:

> "The common law provides actions for damages against the searching officer [citing cases]; against one who procures the issuance of a warrant maliciously and without probable cause [citing cases]; against a magistrate who has acted without jurisdiction in issuing a warrant [citing cases] and against persons assisting in the execution of an illegal search [citing cases]. * * *"

Petitioners contend that there is no distinction between a state legislator and a federal congressman and that there should be no distinction between a claim of civil liability against members of a state Un-Amer-

ican Activities Committee and the members of the Un-American Activities Committee of the House of Representatives (Brief for Petitioners, page 36).

In connection with Section 43 there is however a vital distinction between state and federal legislators: Section 43 predicates liability only upon action taken under color of *state* law. Since federal legislators do not act under color of *state* law, their conduct is not subject to the sanctions provided for under said federal statute. It would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barksy v. United States,* 167 Fed. (2d) 241; *Dennis v. United States,* 171 Fed. (2d) 986 and *Eisler v. United States,* 170 Fed. (2d) 273. It may be said in passing, however, that even as to the power of Congressional Committees it was stated in *McGrain v. Daugherty,* 273 U.S. 135, 175-176:

> "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*[3] and *Marshall v. Gordon*[4] point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *Re Chapman*[5] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the ques-

[3] 103 U.S. 168.
[4] 243 U.S. 521.
[5] 166 U.S. 661.

tions are not pertinent to the matter under inquiry."

See also:

Dissenting Opinion, per Edgerton, J. in *Barksy v. United States,* 167 F. (2d) 241, 252;

Dissenting Opinion, per Prettyman, J. in *Eisler v. United States,* 170 F. (2d) 273, 281;

47 *Col. Law Rev.* 416, 428.

Petitioners also seek to escape liability by intimating that the action taken by them was not under color of state law on the ground that the committee had no power to act during a recess taken by the legislature under the California Constitution, Article 4, Section 2 (Brief for Petitioners, pages 11-12). Apart from the fact that it does not appear from the record in this cause that the California Legislature was in fact in recess during the time in question, it is established by *Screws v. United States,* 325 U.S. 91 that one who acts under color of state law is liable under Section 43 even though the action involved was contrary to the state law.

See also:

United States v. Classic, 313 U.S. 299, 326;

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287;

Siegal v. Ragan, 88 F. Supp. 996 affm'd. 180 F. (2d) 785.

Moreover, the California Senate Resolution creating the Tenney Committee (R. 12-18), pursuant to Article 4, Section 37 of the California Constitution, author-

ized said Committee to act during any such recess of the state legislature (R. 14-15).

B. PETITIONERS' CONDUCT WAS IN VIOLATION OF FEDERAL RIGHTS OF RESPONDENT.

The present action is based upon intentional abuse of state authority to deny a political opponent: (1) the right to petition the government for redress of his grievances, (2) the right of free speech, (3) the right to a fair and impartial hearing in matters concerning his person, privacy, opportunity to earn a living and his honor, and (4) the equal protection of the laws.

All these rights are fundamental federal rights and as such are protected by the Federal Constitution and the laws of the United States. They are therefore within the provisions of Section 43 of Title 8 U.S.C.

1. The right to petition the government for redress of grievances.

It is contended by Petitioners that the Federal Constitution does not protect the right of a citizen to submit a petition to the legislature of his own state (Brief for Petitioners, p. 27). This contention is based upon the wording of the First Amendment to the Federal Constitution and underlines the well known fact that the First Amendment, as conceived and worded, was directed against the exercise of federal power in abridgement of the fundamental rights protected by that amendment. Unquestionably the First Amendment was conceived and adopted to prevent the federal authority from interfering with the rights and freedoms specified therein. Nevertheless, the word

"government" referring to the addressee of a citizen's petition did not mean solely the federal government but also the state government. The federal power by reason of the First Amendment is prevented from interfering with petitions where they are addressed to the state government as well as the federal government. This being so, it follows that since the Fourteenth Amendment transmits the prohibitions of the First Amendment into the relationship between state government and those subject to state power, the prohibition against federal power contained in the First Amendment has become a prohibition directed against state power, and, therefore, the state government with all its branches are prevented from interfering with petitions of state citizens to their legislature.

Assuming, arguendo, however, that any flaw were to be found in this logic, Petitioners' contention nevertheless must fail. There is no need for niceties of construction where such an important issue is involved as the one here in question. This Court has always followed the exhortation expressed in the simple words of Chief Justice Marshall: "It is a Constitution that we are expounding."

If a principle of such vast importance and generality as that expressed in the First Amendment is transmitted into the Fourteenth Amendment, then the principle, in its new surroundings, must be understood as the climate and the exigencies of these new surroundings require it to be read. In the words of Mr. Justice Jackson writing for this Court, the Fourteenth Amendment is "an instrument for transmit-

ting the principles of the First Amendment" (*West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639). According to this statement *"principles"* rather than words are transmitted. One of these transmitted principles is the right of free men to address their government freely by petitioning for redress of their grievances. Hence, even if it be assumed that the word "government" in the First Amendment means "federal government" only, transmittal of the principle of the right to petition into the Fourteenth Amendment would mean that the state government can be addressed by a petitioner in the same climate of freedom in which a petitioner can address the federal government under the First Amendment.

This protected sphere of freedom to petition involves freedom of the petitioner from intimidation and molestation in connection with his petition.

The right to petition the government freely is a right so inherent in free society that it hardly needs any expression in the constitution of a democracy recognizing the sovereignty of the people.

Story, in his Commentaries on the United States Constitution, expresses this thought as follows:

> "The remaining clause secures 'the right of the people peaceably to assemble and to petition the government for a redress of grievances'.
>
> This would seem unnecessary to be expressly provided for in a republican form of government, since it results from the very nature of its structure and institutions. It is impossible that it could

be practically denied until the spirit of liberty had wholly disappeared and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."

2 *Story, Commentaries on the Constitution of The U.S.*, 5th Ed., p. 645.

See also:

1 *Cooley, Constitutional Limitations*, 8th Ed., pp. 728, 729.

The origin of the provision in the United States Constitution guaranteeing the right to petition can be traced to the Declaration of Rights in England of 1689[6] which, after the case of the Seven Bishops (*12 Howell's State Trials 183*), confirmed the ancient right to petition for redress of grievances by declaring:

"That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."[6]

This *express* recognition of the ancient right to petition, so long considered self-evident, was the result of periods of suppression of the right by Charles II.

See 1 *May, Constitutional History of England*, pp. 349-350.

Similar suppression of the right to petition under George III by the King and a majority of Parliament gave rise to the solemn emphasis given to that

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[6]Bill of Rights, 1689; Statutes of the Realm VI, 142; 1 Wm. & Mary, st. 2, c. 2. See: Stevenson & Marcham, Sources of English Constitutional History (1937), 599, 601.

right in the documents preceding our own Declaration of Independence[7] as well as in that Declaration itself.

The historical development through which the right to petition for redress of grievances won express recognition as a fundamental right illuminates the content of the right. The necessity of written recognition

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[7] See:

Declaration of Rights.

In Congress, at New York, October 19, 1765.

"• • • Lastly, that it is the indispensable duty of these colonies, to the best of sovereigns, to the mother country, and to themselves, to endeavor by a loyal and dutiful address to His Majesty, and humble applications to both houses of Parliament, to procure the repeal of the act for granting and applying certain stamp duties, of all clauses of any other acts of Parliament, whereby the jurisdiction of the admiralty is extended, as aforesaid, and of the other late acts for the restriction of American commerce."

Declaration of Rights.

In Congress, at Philadelphia, October 14, 1774.

"• • • And Whereas, Assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal and reasonable petitions to the Crown for redress, have been repeatedly treated with contempt by His Majesty's ministers of state:

• • • *Resolved*, 7. That these, His Majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

• • • *Resolved*, 8. That they have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal."

See: United States Constitution, Sesquicentennial Commission, History of the Formation of the Union under the Constitution, with liberty documents and report of the Commission, 1941.

The Declaration of Independence (Adopted in Congress July 2; Signed July 4, 1776).

"• • • In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people. • • •"

resulted from tyranny which attempted to punish and oppress those who dared to exercise the right in matters of public concern. Indeed, May, one of the outstanding authorities on British Constitutional history, speaks of "the modern system of petitioning by which public measures, and matters of general policy, have been pressed upon the attention of Parliament since the suppression of the right to petition by George III".

See: 1 *May, Constitutional History of England,* p. 350.

The practical and legal gist of petitioning the government as of right and not as of grace is: that a petitioner shall be safe in his person when addressing himself to the proper authorities. History illustrates that tyrants deal with petitions arbitrarily, rewarding petitioners if they like what they say, and considering petitioning rebellious and seditious if not in accord with what they wish to hear.

Since it is of the essence in a democratic society to encourage the interest of citizens in public affairs and to permit their criticisms to be heard and considered by those wielding governmental power, it follows that a citizen must be protected from all forms of oppression when he participates by petitioning his legislature in matters of public concern. The right to petition therefore necessarily involves not only access to the constituted authorities, but also the guarantee of personal safety and freedom from reprisal for the exercise of the right.

Amongst the numerous decisions recognizing this principle, the early New York case of *Thorn v. Blanchard* (N.Y.) 5 Johns. 508, is illustrative. The case held that libel does not lie where a petition to an appointing authority criticized a public official and accused him of serious wrongdoing; quoting from one of the majority opinions (Clinton, Senator) at pp. 530-532 thereof:

> "The policy of the law here steps in and controls the individual right of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that, or of an analogous nature. (*2 Hawk. b.1.c. 73 s.8. 4 Bac. Abr. 452. Esp. Dig. 506.* and *4 Com. Dig. 717 c.2.*) The case before us is an application to the council of appointment for the removal of a district attorney, charging him with malversation in office. It is in the nature of a memorial for the redress of grievances, addressed in the proper channel by which such redress might be had. * * * the present complaint was addressed to the proper *forum;* and that unless we deny its power to expel a public officer, holding during pleasure, from office, we must admit, that the grievances complained of by the plaintiff and his coadjutators, were transmitted to the competent and proper authority; and, whether true or false, whether innocent or malicious, the powerful and commanding dictates of public policy must merge and extinguish all individual claims, and all personal considerations."

See:

2 *Story, Commentaries on the Constitution of the U.S.*, 5th Ed., p. 645 (b):

"The statements made in petitions to the proper authority, in a matter within its jurisdiction are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously: Thorn v. Blanchard, 5 Johns. 508; Gray v. Pentland, 2 S & R 23; Howard v. Thompson, 21 Wend. 319; Bodwell v. Osgood, 3 Pick. 379; Harris v. Huntington, 2 Tyler 129; O'Donaghue v. McGovern, 23 Wend. 26; Chapman v. Delorme, 2 Brev. 76; Bradley v. Heath, 12 Pick. 163."

See also:

McKee v. Hughes, 133 Tenn. 455; 181 S.W. 930;

Harrison v. Bush, 5 El. & Bl. 344; 119 Eng. Rep. (Full Reprint) 509;

Connellee v. Blanton (Tex. Civ. App.), 163 S.W. 404;

Keenan v. McMurray, 34 Pittsb. L.J.N.S. (Pa.) 223;

Andrews v. Gardiner, 224 N.Y. 440; 121 N.E. 341;

Cook v. Hill, 1849 (N.Y.) 3 Sandf. 341;

2 *A.L.R.* 1376;

Prosser on Torts, Hornbook Series (1941), pp. 839-840 and note 70 p. 840 with law review articles there cited.

Whatever the scope of the preferred status enjoyed by a petitioner with relation to the content of his pe-

tition, wherever the persons affected by the petition have resorted to the Courts for relief, one thing is clear: Officials whose conduct is discussed and criticized in a petition cannot take the matter into their own hands and silence or punish the petitioner without such reprisal flying in the face of the Constitutional prohibition.

It is not without interest in turning to the Constitution of Switzerland, a country with traditions similar to ours regarding fundamental freedoms, to find that the Swiss Constitution provides in Article 57 thereof that "The right of petition is guaranteed". In construing this provision Professor Fleiner writes in his text book on Swiss Constitutional Law (Schweizerisches Bundesstaatsrecht, 1923) at page 322:

> "The right of petition guaranteed in Article 57 of the Federal Constitution grants to each resident of the country the right to address himself with requests and suggestions to the different branches of the government of the Union and of the Kantons without fear of being subjected to molestations or legal detriments of any kind for such conduct. In a commonwealth based upon sovereignty of the people the right to petition is as a matter of course, within the legal powers of a citizen. The Federal Constitution has specified this right only for historical reasons. The police-state of the eighteenth century was inclined to find in a petition of a subject an illicit intrusion into the powers of a government or even a rebellion. To such an apprehension, the [written] guarantee of the right to petition has definitely made an end." (Translation from the German.)

This discussion of the learned author aptly explains why constitutions of three countries which recognize the principle of the sovereignty of the people have found it necessary to mention the right not to be molested or harassed for submitting one's views to the government.

Professor Bruckhardt, in his annotated edition of the Swiss Constitution, Second Edition at page 545, comments as follows:

> "The right of the individual consists in this, that without legal detriment from the government he may submit such critical or practical utterances to the authorities. It is fitting that such a right of the individual can be guaranteed inasmuch as impediments thereto by the government are conceivable. If the petitioning had not been prohibited and punished formerly, the guarantee of Section 57 would probably not have entered into the Federal Constitution; but since the guarantee is in the Constitution, its meaning can be no other. Incidentally, the right to petition even today, where nobody any more thinks of prohibiting memorials of supplication, carries with it the good sense of securing to everybody the possibility to reach the authority which he invokes and to be interrogated by it. It would be therefore unconstitutional, if any public authority would close its door to petitions; for instance: if an authority consisting of several members, without taking cognizance of such petitions, would give the mandate to individual members to dispose of them themselves; on the other hand, a public authority is, of course, under no obligation, as a whole, to

take cognizance of the full contents of the petition." (Translated from the German.)

This comment seems to be most pertinent in the present case, inasmuch as it makes it clear that the right to petition involves the right of the petitioner to gain free access to the addressee of the petition, not so much in a physical way as by having his full opportunity to gain the audience of the body to which the petition is directed.

In the instant case Petitioners contend that they did not interfere with Respondent's right to petition for the redress of grievances, since they did not snatch from Brandhove's hands the petition which he was circulating among the members of the California Legislature (Brief for Petitioners, page 24). Even in a strictly mechanical sense, interference with the process of petitioning did take place here inasmuch as it appears from the record (R. 5; Complaint par. 4) that Respondent was served with subpoena for the hearing before the Tenney Committee, while he was still physically engaged in so distributing his petition. Such summons was a warning signal to the Respondent and put him on notice that he would not remain unmolested, having dared to criticize those powerful enough to molest and harass him for his criticism.

It is equally clear and obvious that the right to petition the legislature is not confined to and exhausted by distribution of copies of the written instrument. One who petitions a legislative body must stand ready to give explanations whenever requested by that body

and to follow up the effect of the written statement on the minds of the addressees of the petition by discussing with them the contents thereof. A petition to the legislature is made to impress the minds of the addressees and to lead to an interrogation of the petitioner by the legislative body or some committee thereof entrusted with the power and the function to examine the contents of such a petition and to determine whether action by the legislative body is called for.

See:

Ex parte McCarthy, 29 Cal. 395, 406.

The members of the Tenney Committee, as disclosed by the record in the instant cause, in fear of investigation and exposure of their own misconduct by the California Legislature, with the utmost speed, intercepted the attempted exchange of ideas between Brandhove and his legislature by interposing themselves as judges in a matter in which they were the accused.

In this regard the Court of Appeals has correctly recognized and considered the significance of the sequence of the swift moving events as disclosed by the record: The telephone conversation between Tenney and Robinson after Brandhove commenced to circulate his petition among the legislators, and immediately upon Tenney becoming aware of the content of the same (R. 4-5; 45-47); the hastily conceived plan to thwart the purpose thereof (R. 5, 47); the service of the subpoena on Brandhove, while he was

still distributing his petition, to appear before the accused committee on the following day (R. 5, 22); immediately thereafter, the dispatch of State telegrams to the respective District Attorneys demanding Brandhove's prosecution for perjury (R. 6, 23-24); the setting of the stage at the hearing with the full committee and representatives of the State Attorney General's Office and the California Legislative Counsel present with books and authorities ready (R. 26, 33); the presence of Robinson at the hearing as planned and his partial attitude thereat resulting in his being congratulated for his Americanism (R. 6-7; 45-47; 50-67); the vilification of Brandhove to discredit his petition and the intimidation of him at the hearing (R. 7; 42-45; 48-50; 67-69; 73-74); the leading, bolstering and acclamation of Robinson by the Committee in connection with the preconceived plan (R. 7; 45-47; 50-67); the unfair and partial conduct of the hearing with regard to Brandhove and his counsel (R. 6-7; 26-75); the questions asked of Brandhove at the hearing, the answers to which the Committee had long previously obtained from him (R. 7); the holding of Brandhove in contempt for failure to answer those questions (R. 42); and, the arrest and imprisonment of Brandhove on the contempt charge brought by the Committee (R. 8-9).

The constitutional guaranty of the right to petition for redress of grievances applies to petitions directed to proper authorities, or to the authorities which the petitioner in good faith deems to be proper ones

under the circumstances. See *Larkin v. Noonan,* 19 Wis. 93; *Marks v. Baker,* 28 Minn. 162, 9 N.W. 678, 679; *Connellee v. Blanton* (Tex. Civ. App.), 163 S.W. 404; *Thorn v. Blanchard* (N.Y.), 5 Johns. 508.

In this case there can be no question that Brandhove addressed himself in his petition to the only proper authority, since there was no authority except the legislature which had power to discontinue further appropriation of funds for the Tenney Committee.

Petitioners rely on *Ex parte McCarthy,* 29 Cal. 395, in justification of their conduct toward Brandhove. The *McCarthy* case simply holds that the California Legislature has a right to investigate charges against its members, such as the charge of bribery involved in that cause. Naturally the case does not hold that the accused members were the proper authority to investigate the charge against themselves. The parliamentary law upon which the California Court relied in that case was that a legislature has the power:

> "* * * among other things, to judge of the qualifications of its own members, to preserve its own honor, dignity, purity, and efficiency, by the expulsion of an unworthy or the discharge of an incompetent member; to protect itself and its members from corruption; and as necessary to the intelligent exercise of those powers they may summon and examine witnesses and compel them to testify by process of contempt, when without good cause they refuse to do so." (page 406).

Brandhove's conduct was precisely in accord with the general rule stated in the *McCarthy* case: by his

petition he called the attention of the entire legislature to the alleged misconduct of certain of its members (those constituting the Tenney Committee thereof). By preventing an impartial investigation by the legislature or an opportunity for the legislature as a whole to consider Brandhove's petition, the Tenney Committee did all in its power to defeat the proper exercise of the rights of the California Legislature under general rules of parliamentary law as recognized by the California Supreme Court in the *McCarthy* case.[8]

2. The right of free speech.

It is clear that there can be no rigid distinction drawn between the right to petition for redress of grievances and the right to speak freely. The right to petition is merely the exercise of freedom of speech under certain circumstances which entitle the speaker to even greater consideration and protection in the dissemination of his ideas since he directs his utterances to the proper authorities. By petitioning the proper authorities, the speaker channels his criticisms and ideas to the government which is supposed to receive, weigh and consider such expressions, and if found to be constructive, to use them in the public interest. The very concept of sovereignty of the people requires this kind of continuous participation of the people in their government, and the preservation

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[8] With regard to the vital difference between the legislative body acting as a whole and an unauthorized committee thereof, see: semble accord:

United States v. Bryan, 339 U.S. 323, 325-326;
United States v. Fleischman, 339 U.S. 349, 365.

of a republican form of government necessitates the encouragement and protection of the exercise of this right (Art. IV, Sec. 4, U.S. Constitution).

As stated by this Court in *Thomas v. Collins*, 323 U.S. 516, 530-531:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the right of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, c.f. *De Jonge v. Oregon*, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. C.f. 1 Annals of Congress, 759-760 * * * Great secular causes, with small ones, are guarded. The grievances for redress of which the right to petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

Petitioners contend that respondent's right of free speech was not infringed by them, since he had already finished speaking, before the Tenney Committee hearing took place (Brief for Petitioners, page 23).

This contention overlooks the facts that the subpoena for Brandhove to appear before the Tenney Committee was served while he was in the physical process of distributing his petition and that at substantially the same time State telegrams were dispatched to two different District Attorneys admon-

ishing them in the name of the California State Senate Committee to prosecute the Respondent in connection with his petition. But even more important, such contention ignores the scope of the right of free speech which depends upon the context in which it is exercised. There is a patent difference between making a speech in a public park and addressing the legislature in a petition dealing with a complex problem of public interest.

See:

Concurring opinion of Mr. Justice Frankfurter in *Feiner v. New York,* 95 L. Ed. Adv. Op. 253, 263.

Whereas the street speaker is at the end of his speech when he has uttered his last sentence, a petitioner who has delivered a petition to each member of his legislature is only after circulation thereof, at the very threshold of the exercise of this right. For after the delivery of the written word into the hands of the addressees, it becomes necessary for him to persuade each member of the legislature who is interested in the matter, by the normal processes of persuasion, that the evils asserted therein should be gone into and remedied.

Petitioners also ignore the fact that the right of free speech is guaranteed by the Constitution not merely for the benefit of the individual who exercises that right, but in order to insure the continuing existence of a democratic community. Suppression or punishment subsequent to the exercise of the right is therefore unconstitutional.

As recently stated by this Court in *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5:

> "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger * * * That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

It appears to be Petitioners' position that since they did not *expressly* prohibit further dissemination by Respondent of his petition and his ideas therein expressed, no infringement of the right of free speech was perfected.

The constitutional right of free speech is protected against more subtle attacks than such express prohibition. Where, as here, State authority is used as a pervasive threat, creating a situation and atmosphere of fear and danger for him who speaks, a violation of this fundamental right is effected.

See:

Schneider v. Irvington, 308 U.S. 147, 161-162;
Thornhill v. Alabama, 310 U.S. 88, 101-102;
Pennekamp v. Florida, 328 U.S. 331.

This guiding principle has been recently expressed in *American Communications Association v. Douds*, 339 U.S. 382, 402:

> "The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief. But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragement' undoubtedly has the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

In the *Douds* case, this Court emphasizes the doctrine that if there are paramount interests outside of the struggle of ideas which make it necessary to limit or restrict the right to free speech, the urgency of such interests will be weighed against the interest of society in the free exercise of the right of free speech. —"Even harmful conduct cannot justify restrictions upon speech unless substantial interests of society are at stake." (Page 397.)

In the instant case, Petitioners contend that there is here involved a paramount interest of the people to elect and have legislators act for them who are answerable only to the people (Brief for Petitioners, Pages 38-39). But legislators, though they may criticize others with immunity, are, in the struggle of

ideas, not immune from the criticism of the public and any member thereof. No question is raised as to the right of the Tenney Committee and its members to use their influence and faculties of persuasion to secure the continued existence of their committee. For such end, however, they must fight in the political arena on the level of equality with others; they cannot use their public power to silence the voice that displeases them. "Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment." (*American Communications Association v. Douds*, 339 U.S. 383, 396.)

At the core of Petitioners' argument is the thought that even in abusing their powers, they should not be held liable in damages to a person whose fundamental rights they have violated. This contention is beyond the scope of the present litigation; it is clearly an invitation for judicial legislation to abolish the Civil Rights Statutes as applied to State Legislators.

3. Violation of due process of law.

The issue of violation of due process of law by the conduct of Petitioners has been properly raised in Braidhove's complaint (R 3-11; 11-75).

This attack against the conduct of Petitioners in wielding State power cannot be considered separate and apart from Respondent's allegations relating to his First Amendment rights. The method and man-

ner used by Petitioners to meet the criticism uttered in Respondent's exercise of constitutional rights are indicative of their obnoxious intent, and quite apart from the due process question, are a necessary part in the determination relating to the violation of First Amendment rights. For example: Where a speech is made on a city street at a place where traffic is obstructed thereby, it is proper for the police to request the speaker to continue at another place in the vicinity, while free speech would be there infringed by the use of a police club to silence the speaker.

Insofar as due process itself is here concerned, we start with the proposition that "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice * * * It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused 'the Assistance of Counsel for his defense.' " (*Foster v. Illinois*, 332 U.S. 134, 136.)

Respondent's challenge in reliance upon the due process clause of the Fourteenth Amendment does not relate to the several actions of petitioners considered in isolation, but involves petitioners' entire pleaded conduct considered as a whole. When so considered and evaluated, petitioners' method and manner in dealing with their opponent cannot be distinguished from the contemptible and vindictive means of a police state.

This approach to the due process problem has been expressed by Mr. Justice Frankfurter as follows:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the due process clause imply that judges are wholly at large." (Mr. Justice Frankfurter, concurring in *Adamson v. California*, 332 U.S. 59, 67-68.)

See also: *American Communications Association v. Douds*, 339 U.S. 382, 394, quoting the remarks of Mr. Justice Holmes that the provisions of the Constitution

> "are not mathematical formulas having their interest in their form", but, "organic living institutions transplanted from English soil." (*Gompers v. United States*, 233 U.S. 604, 610.)

In the instant case, the Tenney Committee, entered into the hearing in question as a partisan and acted as such even prior to the commencement thereof. No other explanation can be given for the State telegrams dispatched by the chairman and vice-chairman of the committee to the respective District Attorneys demanding prosecution of Brandhove in connection with his circulated petition (R. 23-25). This act of vindictiveness is clear corroboration of Respondent's allegation that the committee did not wish to conduct

a fair investigation but intended to and did punish and oppress him during said hearing and afterwards.

See:

Screws v. U. S., 325 U.S. 91, 106:

> "Those who decide to take the law into their own hands and act as prosecutor, jury, judge and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act."

See also:

Tot v. U. S., 319 U.S. 463.

As the allegations of Respondent's complaint must be taken as true, it further appears that the chairman of the committee had already conspired with the star witness, Robinson, prior to the setting of the hearing to thwart the effect of Brandhove's petition, to blacken his character and to vindicate the committee and its star witness from the charges contained in said petition (R. 5-6; 45-47).

In congruity with the object of the hearing is the treatment received by Respondent's counsel at the hands of the committee—the calling of him as a witness and his lengthy interrogation concerning his schooling and his private affairs. The questions then and there put to counsel clearly show that the committee did not know him and had not the slightest reason to call him as a witness except for counsel's undertaking to represent their political opponent (R. 7-8;

48-50). The Federal Constitution stands as a bar against such contemptuous treatment of an attorney engaged in the practice of his profession, to say nothing of the intended and effective intimidation of Respondent by such treatment of his counsel. It is also pointed out in this connection that when Respondent's counsel referred to decisions of the United States Supreme Court supporting the objections raised by Respondent against said hearing and supporting Respondent's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room (R. 8; 34-35).

With regard to Respondent, the unfairness of the committee's conduct and their vilification of him at the hearing, culminated in the reading into the record thereof, a false alleged criminal record attributed to him, which "record" was read *after* the Tenney Committee had cited him for contempt (R. 42-44). These were the words of Petitioner Tenney in his capacity as chairman of the Committee:

> "Mr. Brandhove has a criminal record; he was charged with sodomy in Jersey City on October 27th, 1930; on October 3rd, 1935, grand theft; and went to Preston School of Industry; May 5th, 1940, in Oakland, sentenced to $25.00 or five days for violation of the California Motor Vehicle Code; April 7th, 1942, wanted for grand theft and burglary in San Jose, California; March 17th, 1946, San Francisco, malicious mischief at 1255 Kearny Street, San Francisco; November 26th, 1946, San Francisco, violation of the Penal Code for defrauding an innkeeper; a felony warrant for his arrest charging grand theft, Section 503

of the Vehicle Code, was cancelled in Los Angeles because the victim could not be located on March 3, 1947" (R. 43-44).

As alleged by Respondent in his complaint (R. 10), this reading of a false criminal record was maliciously done by Petitioners for the unlawful purpose of intimidation and harming him in his most sacred rights.

Even carelessness leading to the reading of a false criminal record has been excoriated by this Court as irreconcilable with minimal standards of fair play:

> "But it savors of foul play or carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty * * * It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the carelessness or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." (*Townsend v. Burke*, 334 U.S. 736, 740, 741).

In the instant case, counsel, although present was powerless, after his client had already been cited for contempt and after counsel had been threatened with expulsion from the hearing room, to protect Brandhove from such designed attack on his honor (R. 26-75).

See also:

Michelson v. United States, 335 U.S. 469, 480;
Wolf v. Colorado, 338 U.S. 25, 30, 31.

Finally, in addition to the false criminal record, it appears from Respondent's pleadings herein that after he was cited for contempt at the hearing in question, the chairman of the Tenney Committee read into the record thereof, a passage of a newspaper article wherein an affidavit of Respondent was termed "a tissue of lies" (R. 44-45) and referred to an alleged telephonic statement from the counsel for the committee that Respondent "was a liar" (R. 73-74).

If such is a fair and impartial hearing as contemplated under the Fourteenth Amendment of the United States Constitution, the Respondent admits that he has failed to state a claim for relief on such ground.

4. Denial of equal protection of the laws.

Deprivation of an individual of his fundamental rights by state officials on the ground that his views are opposed to theirs or that he has aired their corruption or misconduct, is one of the most obnoxious patterns of denial of equal protection of the laws as guaranteed by the Federal Constitution. State power, when its exercise is not limited by standards that appeal to reason, becomes absolute, and such power where exercised maliciously, becomes suppression in the private interest of those wielding the state's power. If the general guaranty of equality would fail to check devices and stratagems in circumvention of First Amendment rights by malicious use of power claimed to be practically absolute, our system of government would be at the whim of those who despise its most cherished values or fail to understand them.

Under circumstances lacking many of the somber implications of the instant case, this Court has recently relied on the Equal Protection Clause in striking down the exercise of public power, unlimited by reasonable and definite standards, to prohibit the use of a public park for a religious meeting. Mr. Chief Justice Vinson, writing for the Court in *Niemotko v. Maryland*, 95 L.ed. Adv. Op. 237, 239, stated:

> "* * * we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice', whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here. * * * Indeed, rarely has any case been before this Court which shows so clearly an unwarranted discrimination in a refusal to issue such a license. * * * In fact, the Mayor testified that the permit would probably have been granted if, at the hearing, the applicants had not started to 'berate' the Park Commissioner for his refusal to issue the permit. The only questions asked of the witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the witnesses or their views. *The right to equal protection of the laws, in the exercise of*

those freedoms of speech and of religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local government body." (Emphasis added.)

Indeed, when the scene is transmitted from the local sphere in the *Niemotko* case to the larger sphere of state politics in the instant case, and when bigotry, local camaraderie and vanity there at work are replaced by corruption and lust for power of a clique seeking to perpetuate the vast powers of an Un-American Activities Committee, which is the gist of the allegations in this case, a striking parallelism between the two cases appears. In both cases a small body of men (there is no proper basis for Petitioners' attempt to identify their Committee with the State Legislature with its great number of members holding widely divergent views) exercising practically absolute power infringed upon freedom of speech and cognate freedoms by reason of antagonism and selfish interests. The difference lies in the facts that in the *Niemotko* case the deciding body was not judge and accused in the same case; that it did not interfere with orderly democratic processes, such as petitioning to a State Legislature; that no demands were made on state prosecutors to indict the unwelcome speaker; that the attorney appearing at the hearing was left unmolested; and that no criminal record was invented to blacken and discredit the injured person. Such methods applied by the Committee assisted by two state attorneys at the hearing in question obviously

multiply the reasons for the Court's holding in the *Niemotko* case that whim and personal antipathy cannot control the exercise of state power in matters concerning free speech, freedom of petition and cognate fundamental rights without violating equality of protection by the laws.

In the *Niemotko* case, the holding that there was a denial of equal protection was based on the determination that the refusal to grant the permit was "completely arbitrary and discriminatory" (p. 240, 95 L. Ed. Adv. Op.). In that case this Court found it unnecessary to determine that other permit applicants were treated differently from the complainants. Indeed no reasonable distinction can be drawn between an arbitrary and discriminatory practice against all applicants as opposed to one, under which some are treated better than others. Equality of the law is denied where whim determines official action.

In the instant case, Robinson's treatment as a witness was clearly and purposefully different from the treatment accorded to respondent and his counsel at the same hearing. Furthermore, there is a presumption under California law applicable by the Federal Court sitting in California, that official duty has been regularly performed (California Code of Civil Procedure, Section 1963(15)) which necessitates the conclusion that the Tenney Committee has discriminated against Respondent.

Evil purpose, object and malice in deprivation of equal protection of the laws are properly pleaded by

general averment in Respondent's complaint (Complaint paragraphs 13, 14; R. 10).

See:

F.R.C.P. Rule 9(b);
F.R.C.P. Rule 8(f);
F.R.C.P. Rule 8(a)2.

As stated in *Snowden v. Hughes,* 321 U.S. 1, 11:

> "Where [purposeful] discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."

See:

Nixon v. Herndon, 273 U.S. 536, 540;
Nixon v. Condon, 286 U.S. 73, 88-89.

See also Mr. Justice Frankfurter concurring in *Snowden v. Hughes,* 321 U.S. 1, 13-15:

> "The Fourteenth Amendment does not permit a State to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment."

Apart from the express averments of malice and purposeful discrimination by Respondent, the facts pleaded by him inescapably lead to the conclusion that there was purposeful discrimination which element was lacking in *Snowden v. Hughes,* 321 U.S. 1, 8, and if there present, would have been sufficient for a reverse holding there.

(The dissenting Justices even in the *Snowden* case found sufficient allegations as a predicate for proof of purposeful discrimination.)[9, 9a]

The essence of the matter here is that Respondent was singled out for arbitrary treatment purposefully discriminating against him by design and plan of petitioners to use their power to suppress his views and criticism and to punish him for his utterances.

Such state action has been held to violate the equal protection guaranty and to be sufficient basis for civil liability under the Civil Rights Statutes.

See:

Burt v. City of N. Y., 156 F. (2d) 791, 792 (opinion by Learned Hand, J.):

"But the decision [*Snowden v. Hughes*, 321 U.S. 1] definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also

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[9]Purposeful discrimination may appear on the face of the action taken with respect to a particular class or person, *Snowden v. Hughes*, 321 U.S. 1, 8; *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-87, or it may be shown by extrinsic evidence relating to a discriminatory design to favor one individual or class over another not to be inferred from the action itself.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374;
Neal v. Delaware, 103 U.S. 370, 394, 397;
Norris v. Alabama, 294 U.S. 587, 589;
Pierre v. Louisiana, 306 U.S. 354;
Smith v. Texas, 311 U.S. 128, 130-131;
Hill v. Texas, 316 U.S. 400, 404;
Cochran v. Kansas, 316 U.S. 255, 257-258.

[9a]It should be noted that the new rules of pleading as amended in 1946 and 1948 with the purpose of liberalizing pleading requirements were not in effect at the time of the decision in the *Snowden* case. It would seem that the dissenting opinion there conforms to the present liberalization of pleading. See: Notes of Advisory Committee on Rules, F.R.C.P., 28 U.S.C.A., pp. 252, 317.

with purposely singling him out alone for tha
misinterpretation, it is good against demurrer.

See also:

McShane v. Moldovan, 172 F. (2d) 1016;
Picking v. Penn. Ry. Co., 151 F. (2d) 240.

5. **Abridgement of privileges and immunities of respondent.**

Whatever the meaning of the words "privileges o
immunities" in the Fourteenth Amendment to th
United States Constitution, it is clear that the word
as used in Section 43, Title 8, U.S.C. supplement th
word "rights" immediately preceding them, therein
The privileges or immunities in Section 43 and th
similar expression in Section 47(3) make it clear tha
any favorable position secured to a citizen (regard
less of distinction between Federal and State citizen
ship) by the Constitution and the laws of the Unite
States are within the purview of these sections.

Thus, he who exercises his right to petition the Gov
ernment for redress of grievances shall be immun
from molestation and chicanery by action under colo
of State law; whether that be termed a right, a privi
lege or an immunity shall make no difference unde
the all-embracing language of Section 43 and the sim
ilar language in Section 47(3).

See:

Hague v. C.I.O., 307 U.S. 496.

III.

RESPONDENT'S COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE PROVISIONS OF SECTION 47(3) OF TITLE 8 U.S.C.

What has been discussed above pertaining to denial by Petitioners of Respondent's right to the equal protection of the laws demonstrates that respondent's complaint is within the purview of Section 47(3), Title 8, U.S.C. The cases cited with reference to equal protection of the laws are hereby referred to as authority for the applicability of Section 47(3) to this case.

Section 47(3) not only prohibits action in denial of equal protection of the laws but also action "for the purpose of preventing or hindering to all persons within such State or Territory the equal protection of the laws".

Petitioners here held the hearing before the Tenney Committee for the very purpose of preventing the California Legislature from taking up the matter of Brandhove's petition. By staging a purported investigation with witnesses called and purported evidence read into the record thereat, the matter was for all practical purposes taken out of the hands of the California Legislature and prejudged by the Tenney Committee which threw it into the lap of the Courts thus making any investigation by the Legislature futile. Hence the Committee acted for the purpose of preventing or hindering the constituted authorities of the State of California from giving Brandhove the

benefit of equal protection of the laws—a violation of the terms of Section 47(3).

IV.

UNDER THE CIVIL RIGHTS STATUTES, THE FEDERAL COURTS ARE EMPOWERED TO DETERMINE WHETHER A STATE LEGISLATIVE COMMITTEE OR ITS MEMBERS HAVE VIOLATED THE FEDERAL RIGHTS OF ANOTHER BY INTENTIONAL ABUSE OF STATE POWER.

(A) The power of the Federal Courts to protect Federal rights under the Civil Rights Statutes extends to anyone clothed with State power who intentionally deprives a citizen of his Federal rights.

Where State power is used for such an end, the abuse cannot be excused by the fact that the same power could have been used for a proper end. As stated by Mr. Justice Holmes speaking for this Court in *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114:

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, U. S. v. Reading Co., 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

It is axiomatic that the same power which may be constitutionally exercised under one set of facts, becomes unconstitutional and unlawful if exercised under different circumstances.

In the instant case we are not concerned with the investigatory and inquisitorial power of State Legis-

lative Committees for an end that is lawful under the Federal law. We are here concerned with an exercise of such State power for an unlawful end, namely, to deprive a citizen of fundamental Federal rights. The question here involved is not the motive[10] of the Committee and its members, but is whether or not they acted with the intent and for the purpose of silencing a political opponent by abuse of State power.

Where the invasion of Federal constitutional rights is at issue, the scrutiny of the Federal Courts extends of necessity to factual questions, such as intent, deliberate planning and malice. As stated in *Oyama v. California,* 332 U.S. 633, 636:

> "In approaching cases such as this one, in which federal constitutional rights are asserted, it is incumbent on us *to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.*" (Emphasis added.)

In the *Oyama* case this Court referred to *Patton v. Mississippi,* 332 U.S. 463, 465, where the impact of the principle against deliberate exclusion of Negroes from a jury was stated as follows:

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[10] "'Motive' and 'intent' are not identical, and an intent may exist where a motive is wanting. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. In the popular mind, intent and motive are often regarded as the same thing, but in law there is a clear distinction between them. • • •" Black's Law Dictionary, 3rd Ed., p. 1209, and cases there cited.

"A long and unbroken line of our decisions * * * has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.' *Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case.*" (Emphasis added.)

See also:

Shelley v. Kramer, 334 U.S. 1.

In *Norris v. Alabama,* 294 U.S. 587, the evidence as to whether Negroes had been discriminated against in the selection of grand juries was conflicting. Chief Justice Hughes, writing for the Court, said at pages 589, 590:

"The question is of the application of this established principle [equal protection] to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state

> court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

This same rule has been announced in numerous other cases, many of which are collected in footnote 4 of the dissenting opinion of Mr. Justice Black in *Feiner v. New York*, 95 L. Ed. Adv. Op. 257, 258.

If, as alleged by Respondent, the Committee in question and its members acted with such intent and for such unlawful end, they cannot escape the sanctions of the Civil Rights Statutes and the word "motive" cannot be used as a magic wand to obliterate the manifest purpose of the Federal Constitution and those Federal statutes enacted to protect civil rights.

See:

Cook v. Marshall County, 196 U.S. 261, 271 infra.

(B) The doctrine of separation of powers, important as it is in determining judicial review of acts of Congressional committees by Federal Courts has no application where the issue is abuse of State power in collision with Federal rights.

In the instant case we are not concerned with the question whether Federal Courts can check the abuse of the powers of Congress and Congressional Committees, or whether the principle of separation of powers bars the Federal Courts either absolutely or

to some extent from such review. If *State action,* as distinguished from Federal governmental action, is involved, the Federal Courts are not barred from exercising their power to protect the Federal rights of citizens regardless of whether the asserted violation of such rights emanates from the legislative branch or any other branch of the State government. "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U.S. 673, 680; *Shelley v. Kramer,* 334 U.S. 1, 15.

V.

THE RESOLUTION OF THE CALIFORNIA STATE SENATE CREATING THE TENNEY COMMITTEE IS UNCONSTITUTIONAL.

The California Senate resolution creating The Tenney Committee (R. 12-18) violates the due process clause of the Federal Constitution, Amendment Fourteen, in that it lacks the degree of certainty which is required in a statute or other rule of State law where it is applied to affect such fundamental rights as freedoms of speech, petition, honor, opportunity to earn a living and privacy.

See:

Kunz v. New York, 95 L.ed. Adv. Op. 240;

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;
In re Di Torio, 8 F. (2d) 279, 281;
Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

Petitioners allude to fact that the constitutionality of the instant resolution was also attacked in *Vern Smith v. California*, 336 U.S. 957, and that the Court dismissed an appeal from the Superior Court of Alameda County, California, for want of a substantial federal question (Brief for Petitioners, p. 10). Such was also a contention in the *Kunz* case where the New York ordinance there in question had been previously challenged in *People v. Smith*, 263 N.Y. 255, 188 N.E. 745 and an appeal was dismissed for want of a substantial federal question (*Smith v. New York*, 292 U.S. 606). In *Smith v. New York*, 292 U.S. 606, as in *Vern Smith v. California*, 336 U.S. 957, the attack on the constitutionality of the respective enactments was made in the abstract rather than with regard to the application of the enactments to concrete facts involving arbitrary action on the one side and fundamental liberties on the other.

Petitioners' contention that the California Supreme Court made a ruling on the constitutionality of the instant resolution by denying Respondent's application for a writ of habeas corpus after his arrest and imprisonment, is clearly erroneous. This writ was applied for *prior to the trial* which led to Respondent's discharge and the California Court simply did not exercise its discretion, vested in the Court in ex-

traordinary cases, to grant a writ of habeas corpus in advance of trial.

See:

In re Bell, 19 Cal. (2d) 501;

Rescue Army v. Municipal Court, 28 Cal. (2d) 460.

The issue of the constitutionality of said resolution is raised however only in the alternative; it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of the resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

VI.

RESPONDENT IS ENTITLED TO TRIAL ON HIS COMPLAINT.

It appears from the foregoing discussion that respondent has stated a claim for relief under the Civil Rights Statutes.

We deem it unnecessary to discuss niceties of pleading since under Rule 8 (f), F.R.C.P., all pleadings shall be construed as to do substantial justice. As stated in *Maty v. Grasselli Chemical Co.,* 303 U.S. 198, 200:

> "Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

Under Rule 8a (2), F.R.C.P., a short and plain statement of the claim showing that the pleader is entitled to relief is sufficient. There is no requirement that the pleadings state facts or ultimate facts or fact sufficient to constitute a cause of action.

See:

Dioguardi v. Durning (C.A. 2), 139 Fed. (2d) 774, 775.

Wherever the Federal Civil Rights Statutes apply, damages are recoverable as well as injunctive relief.

See:

Picking v. Penn. Ry. Co., 151 F. (2d) 240, 249;
Chapman v. King, 154 F. (2d) 460;
Bomar v. Keyes, 162 F. (2d) 136;
Brickhouse v. Brooks, 165 F. (2d) 534;
Gordon v. Garrson, D.C. Ill. (1948), 77 F. Supp. 477.

Where grave constitutional issues are involved, it is the policy of the Federal Courts, rather than to refuse relief on demurrer or equivalent motion, to postpone such determination until evidence of the actual facts are before the Court. See: *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213 (concurring opinion By Mr. Justice Stone and Mr. Justice Cardozo). See also: *Williams v. Miller*, 48 Fed. Supp. 277, 280.

In answer to Respondent's contentions, Petitioners use the method of isolating their actions; arguing that some were not deprivative of Respondent's federal rights and others were not accomplished under color of State law. This argument not only overlooks the existence of a common plan pleaded in the complaint,

but also ignores the fact that the entire conduct of Petitioners is an inseparable whole and was engaged in for the single purpose of intimidating, vilifying, and silencing Respondent.

Respondent's pleading, in essence, asserts that all actions taken by petitioners against him were not merely coincidental to some lawful course of conduct, but, as pleaded, served one sole purpose, namely, to single out Respondent for deprivation of his fundamental rights. It is outside of the issues of this case to discuss the degree of culpability required by the Civil Rights Statutes for civil liability. There can be no question that malicious and arbitrary State action taken for the sole purpose of defeating federally secured rights is within the civil liability provisions of the statutes. Fair warning to all potential wrongdoers wielding state power was given by such cases as *Screws v. United States*, 325 U.S. 91; *Hague v. C.I.O.*, 307 U.S. 496; *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240; *Burt v. City of New York* (2 C.A.), 156 Fed. (2d) 791, and others.

CONCLUSION.

In this case the state of facts, as well as the object of the Tenney Committee, are patent. If, nevertheless, these facts do not bring forward the exercise of Federal judicial power to stop such abuse of State power in violation of fundamental Federal rights, the result would be a complete denial of such rights where State legislative committees are infringing them. In

effect, it would then be written into the Constitution of the United States that the right of free speech and the right to petition the legislature for a redress of grievances, are guaranteed only if they are not exercised in opposition to such an omnipotent legislative committee as the California Senate Committee on Un-American Activities.

From the foregoing it is respectfully submitted that Respondent's complaint states a claim for relief against Petitioners and, therefore, the decision of the District Court should be reversed, and, with regard to Petitioners, the decision of the Court of Appeals should be affirmed.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,
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(Appendix Follows.)

Appendix

STATUTES INVOLVED.

(1) Title 8 U.S.C. section 43:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(2) Title 8 U.S.C. 47(3):

"Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice Presi-

dent, or as a member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(3) 18 U.S.C. 241:

"Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5000.00 or imprisoned not more than ten years, or both."

(4) 18 U.S.C. 242:

"Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance regulation, or custom, wilfully subjects any

inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalities, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both."

(5) Federal Rules of Civil Procedure, 28 U.S.C. Rules:

Rule 8 (a) (2):

(a) "Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *."

Rule 8 (f):

(f) "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice".

Rule 9 (b):

(b) "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."